

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :
 :
 v. : No. 01 - 6 Erie
 :
 DANIEL J. LEVETO, :

Hearing held in the above-captioned matter on Monday, November 8, 2004, commencing at 2:00 p.m., before the Honorable Maurice B. Cohill, Jr., in the United States District Court, 17 North Park Row, Erie, Pennsylvania 16501.

For the United States of America:

Rita Genetti-Calvin, Esquire
Thomas G. Voracek, Esquire
Tax Division, Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

For the Defendant:

Daniel J. Leveto, Pro Se
Erie County Prison
1618 Ash Street
Erie, PA 16503

Stephen M. Misko, Esquire
106 S. Main Street, Suite 704
Butler, PA 16001

Reported by Sondra A. Black
Ferguson & Holdnack Reporting, Inc.

1 THE COURT: Based on a status conference, at which
2 all parties were present last week, it was indicated to me by
3 Dr. Leveto that he intends to enter a plea of guilty today.

4 And have there been any conversations with the
5 Government over this?

6 MS. GENETTI-CALVIN: No, Your Honor. We met with
7 the Defendant on three prior occasions before the status
8 conference and sent him two letters offering him a plea of
9 guilty to the major counts. We received a response that he
10 was not interested in that, and we have received no
11 information from him that he is interested in a guilty plea.

12 THE COURT: What's the situation there, Dr.
13 Leveto?

14 THE DEFENDANT: Your Honor, at the status
15 conference we discussed the plea today of nolo contendere,
16 and this was to be an open plea. This is a plea --

17 THE COURT: I did not agree to that, you might
18 recall. I said I would consider it. But it seems to me that
19 all -- I mean, you realize that with a nolo plea you're still
20 just as guilty as you are in a regular guilty plea without
21 the nolo? You understand that? That doesn't help you at all
22 as far as penalties go.

23 THE DEFENDANT: Your Honor, I understand that as
24 far as the sentencing and things like that.

25 THE COURT: Where it would help you -- that means

1 that your -- they couldn't use the nolo plea against you in
2 some kind of a trial over the amount of tax liability that
3 you have.

4 In other words, let's say the Government says you
5 owe \$100,000 -- I know it's more than that. Let's say the
6 Government says you owe \$100,000, and you're saying, I don't
7 owe \$100,000. The Government could not use your guilty
8 plea -- or your nolo plea to convince the jury that they
9 ought to enter judgment for \$100,000.

10 So I don't -- but I don't see what advantage it is
11 to the Court to accept the nolo plea because some judge,
12 probably me, would have to go through the same thing all over
13 again as far as proving the amount of the tax liability. I
14 mean, I'm inclined not to grant the nolo plea.

15 THE DEFENDANT: Your Honor, I understand exactly
16 what you're saying, and I agree with you as far as the
17 numbers go if we talk about civil liability. I think, in
18 this case, though, it is moot in many ways because there is
19 not a criminal number within the Indictment.

20 So I am pleading nolo today basically to that
21 which is within the four corners of the Indictment, which,
22 really, in and of itself is going to require the Internal
23 Revenue Service, like they normally would, to establish a
24 civil liability, because it's not here that I'm pleading to
25 anyway. There are no numbers within the indictment that I am

1 pleading to or which could be set as criminal numbers.

2 So that's where, in this case, the elements of the
3 offense that I'm pleading nolo to are precisely that. That
4 which is in the Indictment.

5 THE COURT: What's your position, Ms. Calvin?

6 MS. GENETTI-CALVIN: Your Honor, our position has
7 been, with Dr. Leveto and with this Court, that we must
8 oppose a nolo contendere plea.

9 THE COURT: That's department policy, I understand
10 that.

11 MS. GENETTI-CALVIN: Absolutely. And we sought
12 advice from the Tax Division, and the case has been reviewed
13 again in the last week, and we also must oppose any
14 conditional aspect of it that -- we cannot sign off on the
15 conditional nolo contendere plea with the condition that Dr.
16 Leveto can appeal the suppression hearing.

17 THE COURT: You mean you're not even agreeable to
18 him making an conditional plea on the suppression?

19 MS. GENETTI-CALVIN: As to nolo contendere. Now,
20 if he were to plead guilty, the Government would entertain
21 the possibility of signing off. But we are without authority
22 today to agree to a conditional nolo contendere plea.

23 THE DEFENDANT: Your Honor, if I might respond.
24 Essentially, the rule is very clear, especially if you read
25 the notes. The Government does have to affirm their

1 acceptance of the conditions of my plea. The plea being
2 conditioned on my appeal. That, I agree with them.

3 As far as the nolo versus guilty, that's really up
4 to the discretion of the Court. The condition was -- and the
5 only reason that the Government has any say whatsoever with
6 the conditional plea is to ensure that there's an agreement
7 between all the parties that it is a dispositive motion and
8 it's not going to waste time. And if it is granted at the
9 appellate court level, it pretty much will dispose of the
10 case.

11 And that most certainly can be -- I have a
12 document today basically, that's hopefully going to have the
13 in-writing requirement of 11(a)(2, that says that we are
14 together on the conditionalness of the plea. Which plea it
15 is is up to the discretion of the Court.

16 THE COURT: Are you saying that the Government has
17 to agree to the conditional plea?

18 THE DEFENDANT: That's exactly what I'm saying,
19 yes. And that has to be -- many circuits are different, but
20 pretty much it needs to be in writing. And I have a document
21 just for that. Not to say that they agree with the nolo
22 contendere. To be quite frank with you, Your Honor, that is
23 up to the discretion of the Court.

24 But I think, in my position, and why, in this
25 situation, it really does mean a lot, is because the criminal

1 numbers that aren't there are really the key factor in the
2 civil liability. So that -- the discussions about that are
3 going to have to be made outside of what this plea colloquy
4 is going to be anyway.

5 THE COURT: I don't understand why the Government
6 insisted on the -- not agreeing to the conditional plea.

7 MS. GENETTI-CALVIN: Your Honor, we ran it up as
8 far as the Deputy Assistant Attorney General, and there is a
9 belief that there is a perception that permitting Defendants
10 to enter pleas without admitting guilty causes, and
11 perpetuates, a negative public perception that the criminal
12 justice system is about obtaining -- is not about justice,
13 but obtaining convictions and putting people in jail. And
14 because it's regarded as less serious than a normal
15 conviction.

16 THE COURT: That sounds more like -- you're
17 talking about a nolo. The conditional plea is -- he's
18 saying, if the suppression hearing stands up, then he's
19 guilty. That's all a conditional plea is. I mean, I'm not
20 sure we're talking about the same thing.

21 He's saying, I'm pleading guilty, and assuming
22 that a suppression -- the evidence that they got during the
23 raid on his office and his home -- or the search of his
24 office and his home -- the information that the Government
25 got from that stuff is enough to make him guilty, unless the

1 search was unconstitutional in the first place.

2 MS. GENETTI-CALVIN: Your Honor, if, in fact, Dr.
3 Leveto is talking about entering into a guilty plea, the
4 Government, certainly, would entertain the possibility of
5 making that a conditional and putting it in writing and
6 having it reviewed. I'm sorry, I misunderstood what Dr.
7 Leveto was saying.

8 THE COURT: That's what a conditional plea is.

9 MS. GENETTI-CALVIN: I thought he was insisting on
10 the nolo aspect of it.

11 THE DEFENDANT: The problem here, Your Honor, is,
12 you used the word "guilty," and the Government has picked up
13 on that. The Government is, essentially, using the nolo
14 contendere as the leverage to not say that they accept the
15 conditional plea.

16 The conditional plea really is a pretty objective
17 type of determination. If the suppression hearing holds, my
18 plea is functionally guilty; if it doesn't hold, it's over.
19 But it gives me the opportunity to do that. But it basically
20 is saying that if it is turned over at the Third Circuit by
21 the Supreme Court -- that's basically saying that my plea is
22 going to be withdrawn anyway.

23 So the conditionalness of the plea is what we're
24 talking about here. But if I didn't know better, I would
25 think that the Government is using the leverage of the nolo

1 to accept or reject it. To accept or reject it is objective.
2 It's not really -- I mean, Your Honor can certainly rule on
3 that if the case -- if it's dispositive to the case, Your
4 Honor.

5 THE COURT: Are you telling me that you will not
6 enter a guilty plea under any conditions?

7 THE DEFENDANT: I cannot enter a guilty plea, Your
8 Honor. I can only enter a nolo contendere. It is closest to
9 my beliefs and what's in my heart, and it is the closest
10 thing to the truth that I can do.

11 THE COURT: Then we'll have to get ready for the
12 trial.

13 MS. GENETTI-CALVIN: Your Honor, that would be our
14 understanding. That if he insists upon both the conditional
15 aspect and the nolo contendere aspect of the plea, the
16 Government must oppose that. And that it's probably
17 preferable, if we can't enter -- resolve this case with a
18 guilty plea or a conditional guilty plea, that we have a jury
19 decide the facts.

20 THE COURT: Well, I don't understand what the --
21 I'm unfamiliar with the -- is it case law or what that
22 says both sides have to agree to a conditional plea?

23 THE DEFENDANT: It's within the notes of Rule 11,
24 yes, it's case law. And it's only because of the dispositive
25 nature. They don't want me going, as a Defendant, to the

1 appellate court and it being something that's not dispositive
2 to the case. So that's really the whole thing, the decision
3 being dispositive.

4 MS. GENETTI-CALVIN: Your Honor, that would be
5 found at Rule 11(a)(2). It says, "With the consent of the
6 Court and the Government, the Defendant may enter a
7 conditional plea of guilty or nolo contendere, reserving, in
8 writing, the right to have an appellate court review an
9 adverse determination of a specified pretrial motion."

10 THE DEFENDANT: In the notes, Your Honor, it
11 separates that into the Government's permission on the
12 conditional part, because, obviously, the Government doesn't
13 have to give permission for a guilty plea. It's the
14 conditional aspect of it that we must all agree on. And
15 they, specifically, in the notes, do say that it's up to your
16 discretion on the nolo versus guilty.

17 THE COURT: I'm looking at it now.

18 Well, it would seem to me, then, we're going to
19 have to have a trial, which I would think all parties would
20 rather avoid. But anyway, in the event that there was a
21 hang-up, I've been given a -- it's the Tuesday after
22 Thanksgiving.

23 THE DEFENDANT: Your Honor, before we do that,
24 could we have a short recess --

25 THE COURT: Sure.

1 THE DEFENDANT: -- so that I can discuss this with
2 stand-by counsel?

3 THE COURT: That would be fine. As I said, I
4 really think you ought try to work out something here because
5 I bet this -- I've had these kinds of trials before on tax
6 liability, and it's like rebuilding everything dollar by
7 dollar versus a -- which is a Herculean task.

8 Okay. Well, send somebody in to let us know when
9 you're ready.

10 THE DEFENDANT: One other point. Your Honor, in
11 other words, is essentially saying that you would not -- that
12 I would not be permitted to enter a nolo contendere plea? Is
13 that essentially --

14 THE COURT: I'm inclined not to because we'd have
15 to go through what I just said. With a nolo plea, if they
16 come back and go after you on civil liability, we'd have to
17 do the same thing all over again -- I mean, not all over
18 again, but we'd have to do what I just described, rebuilding
19 your income dollar by dollar. In other words, they'd say,
20 you spent X dollars on food, Y dollars on the mortgage,
21 and didn't report Z dollars. That's the kind of thing we'd
22 go through.

23 THE DEFENDANT: But, with all due respect, Your
24 Honor, this has none of that already finished or already
25 done.

1 THE COURT: They'd still have to prove that you
2 avoided income tax.

3 THE DEFENDANT: Yes, sir. I just wanted to make
4 sure that that was on the record.

5 THE COURT: I understand there's apparently no
6 dollars mentioned in the thing, but -- I think you ought to
7 talk about it, and then just send somebody in to let us know
8 when you're ready.

9 THE DEFENDANT: Yes, Your Honor. Thank you.

10 (Recess taken.)

11 THE COURT: Do you have anything to report?

12 THE DEFENDANT: Yes, Your Honor. I'd like to make
13 an oral motion. I, as the Defendant, motion the Court to
14 allow me to plead conditionally nolo contendere.

15 THE COURT: What's the Government's position, Ms.
16 Calvin?

17 MS. GENETTI-CALVIN: The Government would oppose
18 such a plea.

19 THE COURT: As you correctly pointed out, the --
20 while we have discretion on the nolo plea, we don't have
21 discretion with respect to the conditional plea. That
22 requires the consent of the Government as well. So there's
23 nothing I can do about that.

24 So we will skip the -- the trial is scheduled --
25 because I was afraid there might be some issues, the trial is

1 scheduled for the Tuesday after Thanksgiving.

2 THE DEFENDANT: Your Honor, you have ruled on
3 that, then? You have ruled that you will not accept the nolo
4 plea?

5 THE COURT: Yes.

6 THE DEFENDANT: In lieu of that, for the record,
7 since the Court will not accept that, I will go on to enter a
8 conditional guilty plea.

9 MS. GENETTI-CALVIN: Your Honor, we would have to
10 reduce that to writing, but at this point we do not oppose
11 it.

12 THE COURT: I didn't hear the first part.

13 MS. GENETTI-CALVIS: We would have to reduce that
14 to writing. Anytime we agree to something, writing is
15 required by Rule 11(a)(2). But we are not opposed to a
16 conditional guilty plea.

17 THE COURT: Can you reduce it like in the next
18 five minutes?

19 THE DEFENDANT: I have a document here, Your
20 Honor, the Government can look at.

21 MS. GENETTI-CALVIN: Your Honor, I hope we can
22 reduce that.

23 THE COURT: Let's reduce it fast.

24 MS. GENETTI-CALVIN: Your Honor, we'll make every
25 effort to do so.

1 (Recess taken.)

2 (Discussion held in chambers.)

3 THE COURT: Where are we?

4 THE DEFENDANT: Well, it seems that the
5 Government, Your Honor, has come up with kind of a quasi plea
6 agreement, and, of course, that's not what this was all
7 about. This was basically about the acknowledgment, by the
8 Government, that I was putting in a conditional plea,
9 conditioned on the ability to appeal the suppression motion
10 and all documents associated with it. And I have acquiesced
11 to the fact that if the Court has denied me the ability to
12 plead nolo, that I will plead guilty.

13 And the -- an hour later, I have significant
14 issues that are presented to me that I have to give up about
15 the first seven bill of rights, and it looks like that we're
16 okay with it. And we're even stipulating to one document to
17 appeal, and I'm giving up everything else. I mean, appeal
18 rights. And this is certainly unacceptable. And I don't
19 want to seem to be hard to get along with, but it just seems
20 as though -- that the leverage that's being placed on me is
21 not particularly fair.

22 THE COURT: What are you being asked to give up?

23 THE DEFENDANT: Sentence appeal rights.

24 THE COURT: Well, that's standard language. I
25 mean, unless I violate the law somehow in the sentencing,

1 while you're -- you can appeal that always.

2 THE DEFENDANT: Just a number of things. Steve,
3 you had looked at a few things here that --

4 MR. MISKO: Judge, the one issue that Dr. Leveto
5 talked about how to do with asserting certain rights, and in
6 the subsection -- or Paragraph 2, that would be A2 of the
7 draft, it indicates that, essentially, Dr. Leveto would be
8 giving up his rights under Washington v. Blakely in having
9 the Court decide on a preponderance of the amount, and he
10 does not wish to do that.

11 There are certain other appellate rights that he
12 does not wish to give up, and that would be Paragraph A6. He
13 waives the right to take a direct appeal for his conviction
14 or sentence under 29 USC 1291 or 3742. It does indicate an
15 exception for the suppression issue. And then, waives the
16 right to file a motion to vacate sentence under 28 USC 2255,
17 attacking his conviction or sentence. He just simply doesn't
18 want to give up his appellate rights in that regard, and
19 that's the reason why he wanted to enter into an open plea.

20 Quite frankly, as CJ attorney and private attorney
21 in the US District Court, we've been entering open pleas
22 lately because the Government is asking us to waive all our
23 direct appeal rights.

24 The Doctor, all he wants to do is just enter into
25 a conditional plea of guilt and litigate the suppression

1 issue. That's all he wants to do. The Government has agreed
2 to it on record, and he just wants to move forth from there.

3 THE COURT: Does the Government have some
4 objection to what he's saying? I don't understand.

5 MS. GENETTI-CALVIN: We came here with the idea
6 that there -- that we were going to oppose a nolo plea. And
7 the latest information that we have from Dr. Leveto, after we
8 sent him two plea letters, was he wanted all charges dropped,
9 and some other demands that there was no way we could
10 acquiesce to. So the possibility of a guilty plea today was
11 really unanticipated.

12 And as people who -- we don't make any policy for
13 the Department of Justice, and, therefore, the Western
14 District of Pennsylvania, nor for the Tax Division. So
15 anytime that we are going to enter into a plea agreement of
16 some sort, we have to get authorization. It's the position
17 of the US Attorney's Office here, and the Department of
18 Justice, that, in return for the Government's agreement to
19 make it conditional, he abide by a written plea agreement as
20 opposed to just pleading straight up.

21 We have sought authorization, we've presented him
22 with a draft -- and when we have a draft such as this, we do
23 not present it to the US Attorney for signature until we have
24 an agreement. And then we would let it be appealed as an
25 advisory opinion.

1 THE COURT: Could I see the draft?

2 MR. MISKO: Yes, Your Honor.

3 MS. GENETTI-CALVIN: But that's where we are.

4 THE COURT: You're objecting, in this Paragraph 2,
5 to, "He agrees that the facts upon which the sentence is
6 based, under the sentencing guidelines, will be determined by
7 the sentencing judge by a preponderance of the evidence."?
8 Is that what you're saying?

9 THE DEFENDANT: One of the things, yes, Your
10 Honor.

11 THE COURT: I don't know if he can waive it -- I
12 mean, if it's -- if Blakely -- well, didn't Aprendi say it
13 had to be beyond a reasonable doubt? I don't see how you can
14 waive a constitutional right.

15 MR. MISKO: Your Honor, my understanding is
16 Blakely has reaffirmed the fact that certain factual issues
17 which decide the level of punishment have to be decided
18 beyond a reasonable doubt, and the Government wants to alter
19 that presumption down from beyond a reasonable doubt to
20 preponderance of the evidence.

21 THE COURT: Right. Well, yeah. Assuming the
22 Supreme Court says Blakely applies to the guidelines.

23 MR. MISKO: Right.

24 THE COURT: But I think Aprendi holds that. I
25 think.

1 It looked pretty -- it looks fairly standard to
2 me, except waiving the preponderance of the evidence
3 condition. And there was on other one I saw in here that I
4 would -- to waive a 2255 petition. I don't think I've ever
5 seen either of those in a plea agreement.

6 MR. MISKO: They're all new, Judge. In the
7 Western District, these are all now being incorporated into
8 plea agreements, and that's the reason why they're not
9 entering into plea agreements. They're essentially asking
10 the defendants to waive all of their appellate rights.

11 THE DEFENDANT: Your Honor, one more point. I
12 think that we're floating and gradually moving away from Rule
13 11(a)(2), which is really the consent of the Government and
14 the Court, written. So we have to really get down to the
15 basics here of the conditional plea of guilty, and all of
16 that -- that could be standard. But, of course, I've not
17 been looking for anything standard, and I've really not been
18 looking for a plea agreement.

19 MR. MISKO: Dr. Leveto, why don't you tell the
20 Court about your research about some circuits don't even need
21 a written document.

22 THE DEFENDANT: Well, that is true. They --
23 there's a lot of discussion about people getting to the
24 Circuit Court of Appeals and finding out that it wasn't
25 documented well enough. And many circuits do say, and I

1 don't know just what circuits do say, if it's on the record
2 and it's clear that the Court knew --

3 THE COURT: I certainly prefer a letter. I mean,
4 you can always have loose language, unintentionally, when
5 you're just talking on the record, but not with a written
6 contract.

7 MR. MISKO: I think the language contained in that
8 one paragraph is acceptable to Dr. Leveto in reference to the
9 conditional plea agreement.

10 THE COURT: Which?

11 MR. MISKO: It was Paragraph 6.

12 THE COURT: You mean waiving the 2255?

13 MR. MISKO: No. At the very bottom.

14 THE COURT: This is 6B, "As a condition of his
15 guilty plea, Daniel Leveto may take a direct appeal from his
16 conviction limited to the issues raised in support of the
17 motion to suppress evidence filed on July 24th. If he does
18 take a direct appeal raised in this issue and prevails, then
19 he may withdraw." That's standard.

20 MR. MISKO: Right. I think, if that was the only
21 language that was contained and agreed to by the parties --

22 THE DEFENDANT: See, that's really what it is.
23 Although, I'd like to add the 21st and then my response and
24 your response. But it's all motion to suppress. That was on
25 September 8th or 9th. It was in response to your omnibus

1 response.

2 THE COURT: Either there's going to be a deal or
3 there's not.

4 MR. MISKO: I just, quite frankly, Judge, haven't
5 been in this territory before, but it also strikes me as
6 unusual that the Government is trying to have a plea
7 agreement as to the language of the conditional plea. And
8 the Court's on notice as to what the purpose of the
9 conditional plea is, then they're asking -- essentially
10 asking Dr. Leveto to -- well, all right. We'll give you a
11 conditional plea, but this is what we have -- you know, this
12 is what we want in exchange for that.

13 And I think that's what Dr. Leveto has a problem
14 with is that you're agreeing to the conditional plea, no more
15 needs to be said. And he wants to do an open plea to the
16 counts in the Indictment, and they're attempting to enter
17 into a plea agreement for the conditional plea. Is that
18 right, Doctor?

19 THE COURT: I understand your logic.

20 THE DEFENDANT: That's exactly right.

21 MR. MISKO: So I think the Doctor is asking you to
22 accept the conditional plea seeing that the Government has
23 already agreed to it.

24 MS. GENETTI-CALVIN: I think that what I'm hearing
25 is that, as the Judge pointed out, sometimes it's better to

1 have something in writing, because when you're saying whether
2 or not the Government opposes a conditional plea -- and I
3 know that on October 12th we wrote him a letter and we said
4 that, "We agree that you may reserve the right to have an
5 appellate court review an adverse determination of your
6 motion to suppress evidence if the Court denies such a
7 motion. In addition, please be advised that Justice
8 Department policy indicates that the Government must oppose
9 the acceptance of a nolo plea." But at all -- you know, at
10 all points -- we are not in a position to -- to enter into an
11 agreement without authorization from the people who are our
12 supervisors.

13 THE COURT: Well, who authorizes it in this case?
14 Is it Mary Beth Buchanan or somebody in DC?

15 MR. Misko: Mary Beth; am I correct?

16 MS. GENETTI-CALVIN: That's correct.

17 THE COURT: And Marshall Piccinini, what, was he
18 the go-between here, or did you folks talk directly to her?

19 MR. Misko: I think the Government went up there,
20 and -- I don't know who you talked to. Who did you talk to?

21 MR. VORACEK: We talked to Marshall, the
22 go-between.

23 THE COURT: Why don't we ask Marshall to come
24 down. Maybe he can help us.

25 MR. Misko: Judge, if you look at the statute --

1 if you look at the rule itself, it almost appears that the
2 only person that has to state what the issue is for the
3 purpose of the conditional plea is the Defendant. And as
4 long as the Government says, yep, he's right, then that lays
5 grounds for the conditional plea. And there's nothing in the
6 commentary that suggests there has to be any pleading or
7 motion or document filed by the Government in that regard.
8 And I think that's what Dr. Leveto was offering today was his
9 understanding of the parameters of the conditional plea.

10 THE DEFENDANT: Right. To agree on the
11 conditional plea only means, whether he likes it or who likes
12 it or whoever -- it only means that you have agreed that it's
13 not for delay or frivolous notions, or anything like that.
14 That it truly is dispositive to this case. That's the role
15 of the agreement.

16 Other than that, the types of things, and things
17 like that, are kind of my right that would be approved by the
18 Court. It's a plea conditioned on that. So this is all just
19 a whole lot more. And it's kind of quasi plea agreement, and
20 it has some very big teeth in it that I rightly can't enter
21 into.

22 I mean, as a Defendant, I have a document that has
23 charges against me which lists probable cause to believe
24 several things that I have done. We're talking about my
25 ability to plead, in open court, without entering an

1 agreement with anyone. And, yes, I ask for your acquiescence
2 of the conditional plea, but only as the notes in Rule 11
3 say, for the reasons that they say, that you realize that
4 it's dispositive. If it goes -- if it's overturned, the case
5 is pretty much --

6 (Discussion held off the record.)

7 THE DEFENDANT: I want to apologize, Your Honor.
8 I certainly didn't anticipate making this any more difficult
9 than it is.

10 (Marshall Piccinini, Esquire joined discussion
11 being held in chambers.)

12 THE COURT: Marshall, I asked that they ask for
13 you to come down.

14 MR. PICCININI: Yes, sir.

15 THE COURT: The complication here is Dr. Leveto
16 is -- I don't want to put words in his mouth, but if I can
17 put it in a nutshell, and anybody correct me. He's saying a
18 conditional plea is a conditional plea, and that, on appeal,
19 that's the only thing that a court should be looking at, the
20 applicancy of the suppression ruling.

21 He's -- I don't know if you had anything to do
22 with drafting the agreement or not, but he's objecting to the
23 use of the preponderance of the evidence standard on other
24 things and the waiver of any 2255 opportunities in the
25 future.

1 And he's just saying, you know, all we're doing
2 is, I'm pleading guilty, and if I'm wrong about the
3 suppression, then I am guilty, and, you know, that's it. I
4 just -- I don't understand quite why all the other conditions
5 have to be in there.

6 MR. PICCININI: Judge, for all pleas in the
7 Western District, this being one, the US Attorney's language
8 for those pleas would be required. And the draft that you
9 have in front of you is consistent with all of the pleas that
10 occur in the Western District.

11 THE COURT: I didn't remember that preponderance
12 of the evidence thing. Because doesn't Aprendi say it has to
13 be beyond a reasonable doubt? It seems he might be waiving a
14 constitutional right here.

15 MR. PICCININI: Judge, all of those provisions of
16 preponderance are actually Blakely waiver conditions that
17 this District has required of all guilty pleas since --

18 THE COURT: Maybe I haven't taken -- I guess I
19 have since Blakely.

20 MR. PICCININI: This is what typically is
21 presented to you, Your Honor, at these pleas as being the
22 Blakely waiver, included in the last sentence of the second
23 paragraph. And then, also, in the specific waiver provisions
24 it talks specifically about Blakely-related issues, and that
25 's where those come from. And then, the habeas waiver is

1 also another provision that is new within the District, but
2 has been in all of the pleas.

3 THE COURT: In all of those there's always been
4 some kind of a bargain where the Defendant gets something. I
5 mean, they're dropping a count or agreeing to do this --
6 usually it's dropping a count or two and getting the
7 guideline reduction for pleading guilty. Here all he's
8 getting is the agreement by the Government to a conditional
9 plea.

10 MR. PICCININI: I understand exactly what the
11 Court's -- what you're indicating, that -- this is certainly,
12 from my understanding being in court, this is not one where
13 there's been a request for a dismissal of counts. There's
14 been, really, no negotiations as to the nature of plea.

15 I'm the US Attorney's representative in this
16 matter, and these are requirements I was presented with. The
17 drafted document that Mr. Leveto offered -- and I think that
18 there is a -- there is reluctance where the -- an absolute no
19 to the US Attorney signing off on that document. From the
20 discussions -- this has all just been happening, from our
21 standpoint, in the last hour or so.

22 THE COURT: Sure.

23 MR. PICCININI: I've discussed the matter with the
24 chief of our criminal division, and the first assistant
25 discussed it with the US Attorney, and currently that's the

1 position for the Government in the Western District to agree
2 to the conditional nature of the guilty plea. The other
3 waiver provisions would be required in this District.

4 We also received guidance from -- and there's some
5 discussion between the Department of Justice Tax Division and
6 the chief of our criminal, and I don't think those
7 discussions on this matter --

8 THE DEFENDANT: Mr. -- I'm sorry, we haven't met.
9 I didn't get your name.

10 MR. PICCININI: Piccinini.

11 THE DEFENDANT: Piccinini.

12 MR. PICCININI: Judge, I'm not inclined to answer
13 questions from Mr. Leveto.

14 THE COURT: You may ask me.

15 THE DEFENDANT: Can I ask you. So if my
16 understanding is correct, the Government's position here is
17 that I'm not even permitted to plead guilty without a plea
18 agreement with them? Is that correct?

19 THE COURT: I guess so.

20 MR. PICCININI: Judge, I think that the
21 Government's position is that Rule 11 specifically requires,
22 for a plea to be conditional, the agreement by the
23 Government, and that that agreement be in writing. The
24 Government has no problem, from the US Attorney's
25 perspective, with Mr. Leveto pleading guilty as charged,

1 which he seemed to indicate was his intention. However, when
2 he does so, the Government -- it does require an agreement
3 from the Government to allow it to be conditional. And in
4 order for it to be conditional in this District, the rest of
5 the waiver provisions in this District would have to be
6 complied with. I think that's the US Attorney's position on
7 that matter.

8 THE DEFENDANT: Your Honor, one more point. I
9 think that very important to this position is the clear
10 language of all of the amendments and notes for Rule
11 11(a)(2), and the condition has nothing to do with the
12 Government having other conditions in a plea agreement. The
13 conditioned plea is purely to ensure that they're not -- it's
14 not a frivolous thing that's being conditioned to, and it is
15 dispositive on the case. Those are the issues that the
16 Government needs to agree with.

17 This is like the nolo to being put to guilty.
18 That's the camel's nose under the tent, and this is the
19 result of the next phase. Now I can't plead guilty without
20 consent, because, again, the spirit to the letter of what a
21 conditional plea is and the notes in Rule 11 are very clear.
22 It's got nothing to do with entering into anything like this
23 or entering into a deal. Nothing at all.

24 THE COURT: Well, I'd say you're between a rock
25 and a hard place. I mean, if they either -- if that's their

1 position on the thing, then you have to either accept it,
2 albeit reluctantly, or we have a trial. That's about all I
3 can say.

4 THE DEFENDANT: There's nothing in between that,
5 Your Honor, of ruling what the conditional plea means?

6 THE COURT: I really can't -- I really am not
7 supposed to even -- I've probably done more than I'm supposed
8 to do anyway. I'm not supposed to plea bargain. I'm
9 supposed to just --

10 THE DEFENDANT: And I'm not plea bargaining. See,
11 that's the whole issue here. I'm not plea bargaining. I'm
12 trying to do an open plea to the Court.

13 THE COURT: I know what you're trying to do. But
14 it seems to me, as I said, you have to go one way or the
15 other on it if they're adamant in their position.

16 You can talk about it with Mr. Misko for a little
17 bit, if you want, out in the courtroom, and --

18 THE DEFENDANT: I think I need to do that.

19 (Discussion concluded in chambers.)

20 (Reconvened in the courtroom.)

21 THE COURT: Where are we?

22 MS. GENETTI-CALVIN: Your Honor, I think at this
23 point I need to defer to Dr. Leveto and statement by counsel.

24 THE DEFENDANT: Your Honor, I believe that a
25 continuance is necessary for this proceeding. Perhaps with

1 additional talking between myself and the Government,
2 and myself and stand-by counsel, the issues today that I
3 can't really -- I can't really work with today have come up,
4 and things have changed, and I have to be able to work with
5 stand-by counsel.

6 THE COURT: Well, I mean, if there's going to be a
7 trial we can't -- I can't continue until the eve of trial or
8 something like that. I'd be willing to continue it two
9 weeks. Today's the -- that would be the 22nd, I guess. I
10 mean, I'm not saying that's the day I take the plea, but I
11 want to know in two weeks whether we're going to have a trial
12 or not, that's all.

13 I don't want everything out -- I'm due to come up
14 here on the 30th anyway. So that would be the first day of
15 the trial or be the first day of some other trial if it's not
16 this one. But I'll want to know in two weeks because I don't
17 want to be calling jurors in and sending them back home at 40
18 bucks a day for each juror.

19 Do you want to speak to your Motion on Release
20 From Detention at this time?

21 THE DEFENDANT: I would hold that off also, Your
22 Honor.

23 THE COURT: All right. Then we'll -- I'm not
24 going to -- we'll continue the case for the moment. It's
25 continued indefinitely. But I want an answer on the plea

1 bargain by November 22nd.

2 MR. MISKO: Your Honor, do you want to do a status
3 conference?

4 THE COURT: I'm not scheduled to come up -- I just
5 came up today for this special hearing, which I hoped would
6 resolve the issues. If necessary, I can come up again, I
7 suppose, if you need a status conference. But, as I said in
8 chambers, I really can't get into the essence of plea
9 bargaining. So just keep me posted on what's going on.

10

11 (Hearing concluded at 4:07 p.m.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Sondra A. Black, a Court Reporter and Notary
Public in and for the Commonwealth of Pennsylvania,
do hereby certify that the foregoing is a true and
accurate transcript of my stenographic notes in the
above-captioned matter.

Sondra A. Black

Dated: August 14, 2006